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MAY 29 1933

In the Supreme Court of the United States

OCTOBER TERM, 1932.

KEYSTONE DRILLER COMPANY,
Petitioner,
vs.
GENERAL EXCAVATOR COMPANY,
Respondent.
No. [redacted] 34

KEYSTONE DRILLER COMPANY,
Petitioner,
vs.
GENERAL EXCAVATOR COMPANY,
Respondent.
No. [redacted] 35

KEYSTONE DRILLER COMPANY,
Petitioner,
vs.
THE OSGOOD COMPANY,
Respondent.
No. [redacted] 36

KEYSTONE DRILLER COMPANY,
Petitioner,
vs.
THE OSGOOD COMPANY,
Respondent.
No. [redacted] 37

PETITIONER'S REPLY BRIEF
In Support of Writs of Certiorari.

FRANK O. RICHEY,
WILLIAM H. BOYD,
H. F. McNENNY,
Counsel for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, O.

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KEYSTONE DRILLER COMPANY, *Petitioner,* vs. GENERAL EXCAVATOR COMPANY, *Respondent.*	No. 908.
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KEYSTONE DRILLER COMPANY, *Petitioner,* vs. THE OSGOOD COMPANY, *Respondent.*	No. 910.
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INDEX.

Argument in Reply.

Summary of the Argument:

A. The ruling and facts found in *Carrington v. Pratt*, 18 How. 63, 15 L. Ed. 267, and cases following the doctrine laid down in that case is not applicable to the instant case 2

B. The purpose and importance of the conjoint rule doctrine has been eliminated since the adoption of Equity Rule 26 2

C. Reply to respondents' arguments on the supporting cases 5

D. The contentions on the merits do not substantiate respondents' claims 6

Conclusion 7

Cases Cited.

Carrington v. Pratt, 18 How. 63; 15 L. Ed. 267 2

Edison Phonograph vs. Victor Talking Machine Co., 120 Fed. 305 (C. C. Pa.) 4

I. T. S. vs. Essex, 272 U. S. 429, 433 7

Luten vs. Dover Construction Co., 189 Fed. 405 (C. C. N. J.) 4

Maatshappij vs. Kosloff, 45 Fed. (2) 94, ... 5

United States vs. Title Ins. & T. Co., 265 U. S. 472 5

Varner vs. New Hampshire Saving Bank, 240 U. S. 617 7

Williams vs. Levy, 54 Fed. (2) 18 5

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ARGUMENT IN REPLY.

SUMMARY OF THE ARGUMENT:

A. The ruling and facts found in *Carrington v. Pratt*, 18 How. 63; 15 L. Ed. 267, and cases following the

doctrine laid down in that case is not applicable to the instant case.

B. The purpose and importance of the conjoint rule doctrine has been eliminated since the adoption of Equity Rule 26.

C. Reply to respondents' arguments on the supporting cases.

D. The contentions on the merits do not substantiate respondents' claims.

A.

The respondents attempt to apply the ruling of this Court in *Carrington v. Pratt*, 18 How. 63; 15 L. Ed. 267, to the facts as exist in the case at bar. In that case a single bottomry bond contained items which were fictitious and contained elements of fraud. This of course would be analogous to a suit based on a single patent containing the same elements of fraud.

This Court, however, did not rule on whether relief would have been denied where there were five separate and distinct bottomry bonds on separate and different ships all belonging to the same fleet owner and where only one such bond had been tainted with fraud and where the causes of action had been joined in the same suit. The petition requests a ruling of the Court as to whether or not the petitioner whose rights have been invaded should be denied relief as to the patents which are not tainted with the wrongful conduct, except that they, as separate causes of action, were included in the same bill of complaint.

B.

While the Bills of Complaint allege conjoint use, they also allege a several use and in addition the Answer denies conjoint use. While some of the patents were conjointly

used in some of the infringing constructions, there were also cases that could not have been joined under the old rules so that the question of the application of Equity Rule 26 applies. The Bills of Complaint in the case at bar allege in paragraphs numbered XV a several use by the respondents, and in paragraphs numbered XVII a susceptibility of conjoint use of the inventions covered by the patents in suit. The following paragraph, No. XV, appears in the Bills of Complaint pertaining to the individual or several use by the respondents (R. Vol. I, pp. 7, 101):

> XV. Since the respective dates of issue of said patents Nos. 1,317,431, 1,511,114 and 1,543,250, and since the plaintiff acquired its title to and rights under said patents as hereinbefore recited, and within six years next preceding the filing of this bill of complaint, and without leave of or license from plaintiff, and in defiance of said patents and each of them and of plaintiff's rights thereunder, the said The General Excavator Company has made and/or caused to be made and has used and has sold, and is now making, using and selling within said Northern District of Ohio, Western Division, and elsewhere within the United States of America, numerous excavating machines embodying the inventions described and claimed in and patented by said patents Nos. 1,317,431, 1,511,114 and 1,543,250, and each of them, in infringement of said patents and each of them and particularly in infringement of claims 1, 3, 4 and 9 of said patent No. 1,317,431 of claims 6, 7, 8, 9, 10, 11, 12, 13 and 14 of said patent 1,511,114 and of claims 1, 2, 3, 4, 5, 6, 9 and 10 of said patent 1,543,250, all as by reference to the accompanying affidavit of Robert Rex Downie, together with the exhibits attached thereto will more fully appear.

The paragraphs relating to conjoint use are Nos. XVII as follows (R. Vol. I, pp. 8, 101):

XVII. The invention of the aforesaid patents are susceptible of conjoint embodiment and use in one and the same construction and have been so conjointly embodied and used in the machines made and sold by defendant as aforesaid.

Corresponding paragraphs are to be found in the supplemental Bills of Complaint (R. Vol. I, pp. 47, 48, 142, 143).

The Answers to the Bills of Complaint deny the conjoint use in paragraph 15 (R. Vol. I, p. 37) and paragraph XXIV (R. Vol. I, p. 132) and in the Answer to the supplemental Bills corresponding paragraphs are found (R. Vol. I, pp. 56, 155).

The respondents would have it appear that by isolating paragraph XVII of the Bills of Complaint relating to conjoint use, that the petitioner has abandoned his rights to recovery by a several use of any one of the patents under the allegations found in paragraph XV of the Bills of Complaint, and has also abandoned his rights to proceed under Equity Rule 26. In reality, the broad provisions contained in Equity Rule 26 have eliminated the necessity of pleading conjoint use. The purpose of such pleading being made under the old practice to overcome the defense that where suit is brought on several patents the bill is bad for multifariousness. *Luten vs. Dover Construction Co.*, 189 Fed. 405 (C. C. N. J.); *Edison Phonograph vs. Victor Talking Machine* Co., 120 Fed. 305 (C. C. Pa.)

Your petitioner has never waived or intended to waive any recovery to which he might be entitled because of respondents' wrongful invasion of his rights to the patent monopolies in a several or individual use.

In the instant case the allegation of paragraph XVII was intended to give the trial court a comprehensive scope

of the activities of the respondents in the invasion of the petitioner's rights.

6.

The decision of the Court of Appeals in the Second Circuit on this question in *Maatschappij vs. Kosloff*, 45 Fed. (2) 94, was not *obiter dicta*, as respondents repeatedly assert. It is fundamental that where a Court decides a question upon each of two grounds neither is *obiter dictum* but each is entitled to full weight as a decision and precedent. *United States vs. Title Ins. & T. Co.*, 265 U. S. 472.

The two causes of action in that case were even more closely related than the actions in the instant case. The same articles and precisely the same markings were sought to be enjoined as a trade mark infringement and as unfair competition.

The fact that the finding of unclean hands in *Williams vs. Levy*, 54 Fed. (2) 18, was based upon sharply conflicting evidence, as stated by the Ninth Circuit Court of Appeals obviously does not distinguish that case from the instant case. In this case the only evidence upon which respondents base their contention that petitioner "took elaborate steps to suppress evidence" and attempted to "perpetrate a fraud" is the testimony of a hostile former employee of petitioner. When this testimony and this "unclean hands" contention was sought to be introduced in the case against the Byers Companies, in which it is charged the petitioner obtained the adjudication by "reprehensible conduct," the trial court found that this witness had testified falsely (R. Vol. V, p. 2) and dismissed the "unclean hands" contention.

The conflict in this case is therefore more marked than in *Williams vs. Levy*.

D.

The respondents go into the merits in an effort to stampede the Court. Succinctly stated the most important are:

They say there was fraud. Judge Jones found otherwise after hearing and seeing the witness (R. Vol. V, pp. 2, 109, Exhibits "A" and "F").

They say there was a public use at Joplin. Judge Jones again decided otherwise (R. Vol. V, p. 2).

They say the Joplin experiment anticipated the Downie patent. Both Judge Jones and Judge Hahn after hearing and seeing the witnesses decided to the contrary.

They advance the idea that the Downie patent was the principal patent upon which these suits have been brought. This is not correct. The Clutter patent was the principal patent. (*Byers v. Keystone*, 44 Fed. (2d) 283, 284.)

They say the records upon which the unclean hands is based were forced out of our hands by their activities in uncovering the evidence. This is incorrect. We produced them upon request as soon as we learned Judge Hahn thought the evidence should be submitted. We offered to produce it without an order. A motion of the respondents to compel such production was thereupon denied (R. Vol. I, p. 205).

They claim that the patents are so related to each other that fraud as to one is fraud as to all. This is answered by the fact that the Court of Appeals said that they might be separated in the District Court (R. Vol. V, p. 124). The fact that the Court of Appeals said they might be separated in the District Court is also answer to the conjoint use contention.

It is also a very significant fact that upon the reopening of the case to test the charges made by respondents Judge Jones found that the accusing witness Clutter was untruthful and unreliable. To quote briefly of the opinion by Judge Jones (R. Vol. V, p. 2):

> "His credibility, in my opinion, has been so far impaired as to effectually destroy its weight. * * * The conduct of Clutter both before and after the Byers suit, is of such a character that little credibility can be accorded his evidence with respect to the prior use, unless it can be adequately corroborated and supported; * * *."

The Court of Appeals found that except for the Equity Rule 26 the cases could not have been joined originally. This Court has held that it will accept the finding of the lower court on the facts. *Varner v. New Hampshire Saving Bank*, 240 U. S. 617; *I. T. S. vs. Essex*, 272 U. S. 429, 433.

CONCLUSION.

It is, therefore, respectfully submitted that this Court exercise its supervisory powers, and that the Writs of Certiorari be granted and this Court should review and reverse the decision of the Circuit Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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